

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued September 24, 2001

BALCA Case No. 2000-INA-130
ETA Case No. P1996-DC-03036826

In the Matter of

F. DAVIS AND LYNDY CAMALIER,
Employer,

on behalf of

GERTRUDES DE VERA,
Alien

Appearances: Emeterio G. Roa, III, Esquire

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from an application for labor certification¹ filed by F. Davis and Lynda Camalier for the position of Household Cook. (AF 173-174). The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File ("AF")², and any written argument of the parties. §656.27(c).

¹ Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

² "AF" is an abbreviation for "Appeal File."

STATEMENT OF THE CASE

On February 27, 1996, Employer, F. Davis and Lynda Camalier, filed an application for alien employment certification on behalf of the Alien, Gertrudes De Vera, to fill the position of Domestic Cook. The job to be performed was described as follows:

Prepare meals for a family, with emphasis on Asian cuisine; Plan weekly menu, from breakfast to dinner, including appetizers, salads, desserts and entrees; shop for sufficient quantity of ingredients to satisfy menu requirements, using experience to select the best ingredients according to flavor, freshness, color and other criteria; prepare ingredients for cooking, marinating smoking and applying seasoning using judgment based on experience to achieve best results. Cook ingredients and serve. Maintain and manage kitchen, including appliances and utensils.

Total hours of employment were listed as 40 hours per week, from 9:00 a. m. to 5:00 p. m., with overtime "as needed". Minimum requirements for the position were listed as a High School diploma and two years experience in the job offered, including two years paid experience in the preparation of Asian cuisine.

Employer received no applicant referrals in response to its recruitment efforts. (AF 164).

A Notice of Findings (NOF) was issued by the Certifying Officer (CO) on September 17, 1996, questioning whether Employer's job offer meets the definition of "employment" as stated in the regulations at Section 656.3. (AF 161-162). In a Final Determination dated December 17, 1996, the CO, referring to the definition of "employment" found in 20 C.F.R. § 656.3, held that Employer had failed to demonstrate that a full-time cooking position was involved. (AF 139140).

By Decision and Order dated April 27, 1999, the Board of Alien Labor Certification Appeals (BALCA) vacated the CO's denial and remanded the case for further development with the issuance of a supplemental NOF for reevaluation of the application consistent with the *en banc* decisions in *Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999)(*en banc*) and *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). BALCA instructed:

We note that, in this case, the CO's prior handling of the issue essentially tracks the type of analysis that would be performed under section 656.20(c)(8). Citation only to the definition of employment in section 656.3 when the issue is the nature of the position, however, gives inadequate notice of what is really being questioned by the CO. *Schimoler*, 1997-INA-218, slip op at 5. The distinction in the analysis is that rather than focusing solely on whether the employee will be gainfully occupied for a substantial portion of the work day, an employer must show that the position is a *bona fide* job opportunity under the totality of the circumstances. *See Uy*, 1997-INA-304, slip op at 10-12. Lack of

sufficient duties to keep the worker busy may be an important credibility problem for an employer, but it may not be a determinative factor. (AF 132-134).

A second NOF was issued by the CO on July 13, 1999, citing Section 656.20(c)(8) and questioning the existence of a *bona fide* job opportunity open to any U.S. worker. (AF 129-131). The CO noted that under immigration law, the number of immigrant visas available to "unskilled workers" (those occupations requiring less than two years experience) is very limited, whereas, there is no current waiting period for most immigrant visas in the "skilled worker" category (at least two years experience). Because the occupation of Domestic Cook can require one to two years for proficiency, it is considered to be a "skilled worker" under the immigration law. Employer was instructed to explain why the position of Domestic Cook in their household should be considered a *bona fide* job opportunity rather than a job opportunity that was created solely for the purpose of qualifying the alien as a skilled worker under current immigration law. Rebuttal evidence, at a minimum, was to include responses to twelve enumerated questions including documentation where appropriate.

In Rebuttal, Employer responded to each of the twelve questions. (AF 6-12). Employer stated that the Alien would plan menus, grocery shop and prepare two to three meals each day for their family of six. Employer indicated that Mr. Camalier works outside the home from 7:30 a.m. until 5:30-7:30 p.m. and their two older children attend school from 8:00 until 5:00. Employer further stated that Mrs. Camalier works from home so she can be with their two younger children and that their two younger children are cared for primarily by Mrs. Camalier with the help of her mother and her mother's long time housekeeper. Employer submitted a statement from Mrs. Camalier's mother in support of this. (AF 147). In addition, Employer identified specifically, by name, three other workers they employ to perform domestic chores such as gardening and house cleaning and stated that the Alien is not expected to perform non-cooking functions. Employer submitted a letter from Mr. Camalier's physician stating that his medical condition requires a controlled and restricted diet (AF 12), and thus maintained that the "family's acquired taste for Asian cuisine therefor requires a cook knowledgeable enough about such cuisine that harmful ingredients are taken out and appropriate substitutes are made". Employer stated that the family entertains frequently on both social and business occasions, but noting the availability of caterers, stressed that this was not the main reason for their wanting to hire a domestic cook. In addition, Employer submitted a copy of their tax return documenting that the salary for the petitioned position would be about 5% of their after-tax income.

A Final Determination denying labor certification was issued by the CO on December 3, 1999, based upon a finding that Employer had failed to adequately document that there is a *bona fide* position for a Domestic Cook in their household. (AF 3-5). The CO concluded, "[r]ather the evidence shows that it is more likely that the alien will be employed as a General Houseworker than a Domestic Cook". The CO concluded that because Mr. Camalier is out of the house all day and only one adult and two small children are at home to eat the meals the Cook prepares and serves, "it is implausible that the alien will be engaged as a full-time Domestic Cook".

Employer filed a Request for Administrative-Judicial Review on December 22, 1999. (AF 1-5).

The matter was docketed in this office on March 8, 2000. Employer filed a Statement of Position brief on March 29, 2000.

DISCUSSION

Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U. S. worker. This regulation means that the job opportunity must be *bona fide*, and that the job opening as described on Form ETA 750, actually exists and is open to U. S. workers. The burden of proof for obtaining labor certification is on the Employer who seeks an alien's entry for permanent employment. 20 C.F.R. 656.2(b).

Employer was instructed in the NOF to document why the position of Domestic Cook in his household should be considered a *bona fide* job opportunity rather than a job opportunity that was created solely for the purpose of qualifying the Alien as a "skilled worker". Specifically, Employer was instructed to provide responses to 12 questions which Employer addressed in detail.

In denying labor certification, the CO concluded that the details provided did not establish that there was a *bona fide* position for a Domestic Cook, but rather, showed that it was more likely that the Alien will be employed as a General Houseworker. We disagree, and find the evidence of record does not support such a conclusion. To the contrary, under the "totality of circumstances" rule pronounced in the *Uy* decision, we conclude that the *bona fides* of the instant job opportunity has been established.

As the Board stated in the afore cited decision:

The heart of the totality of the circumstances analysis is whether the factual circumstances establish the credibility of the position. In applying the totality of the circumstances test, the CO's focus should be on such factors as whether the employer has a motive to mis-describe a position; what reasons are present for believing or doubting the employer's veracity or the accuracy of the employer's assertions; and whether the employer's statements are supported by independent verification.

Carlos Uy III, 1997-INA-304 (March 3, 1999).

In the instant case, Employer has documented that their social and business status, coupled with the Mr. Camalier's dietary needs, support the hiring of a full-time cook. The household consists of two adults, both employed, and four children. Employer has documented that there are numerous persons other than the Alien available or employed in the home to carry out the daily functions of maintaining the home and caring for their children. Employer has stated that Mrs. Camalier has chosen to work out of her home so that she can take care of her children, and Employer has specifically identified three other persons who are employed in the home to carry out the duties of gardening, housework and childcare. Employer has stated that the Alien is expected to shop for and prepare daily meals for their family of six. Employer has

also stated that the Alien is expected to serve tea and snacks to Mrs. Camalier's clients on a daily basis and to assist in the preparation of food for entertaining on occasion. Employer has documented that dietary restrictions are imposed by Mr. Camalier's medical condition, thus necessitating a knowledgeable cook with the ability to substitute ingredients consistent with the doctor's advice. Employer has documented the salary for the petitioned position would only be 5% of their after-tax household income. Significantly, Employer in this case was thorough in providing independent supporting documentation to verify their representations. Accordingly, in light of these facts, we find that the bona fides of Employer's job opportunity has been established under the "totality of circumstances" rule, and thus reverse the CO's denial of Employer's application for alien employment certification.

ORDER

The Certifying Officer's denial of labor certification is hereby REVERSED and labor certification is GRANTED.

For the Panel:

JOHN M. VITTON

Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written

statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.